In the

SUPREME COURT OF UNITED STATES

October term, 1940

No.———

MISSOURI PACIFIC TRANSPORTATION COMPANY,
CHARLES D. JOHNSON,
COMMERCIAL CASUALTY INSURANCE COMPANY,
METROPOLITAN CASUALTY COMPANY, *Petitioners*

VS.

EUGENE A. PARKER, ADM., MYRTLE FLAGG, ADMX.,
ALICE CARROLL, ADMX., and ROY PALMER;
Respondents and Appellees Below

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

The petition of the Missouri Pacific Transportation Company, Charles D. Johnson, Commercial Casualty Insurance Company, and Metropolitan Casualty Company,[1] shows to this Honorable Court;

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[1]Commercial Casualty Insurance Company of Newark, New Jersey, is a surety on supersedeas bond given on appeal by Missouri Pacific Transportation Company and Charles D. Johnson. The bond-

STATEMENT OF THE CASE

The Supreme Court of the State of Arkansas affirmed a judgment for damages against petitioners in favor of the respondents, Parker, Flagg and Carroll, who were representatives of the estates of deceased minor children who met their death in a collision between a motor bus operated by respondent Johnson, and belonging to the Missouri Pacific Transportation Company, and an automobile in which the four deceased minors were riding, and operated by young Carroll. The accident occured on the night of December 2, 1938. Respondent Palmer was a passenger on the bus. Trials resulted in verdicts and judgments as follows: For the Carroll boy, $16,000.00 to the Mother, and $2,000.00 for the estate on account of conscious pain and suffering; for the Flagg boy, $16,000.00 to the Mother; and for the Parker boy, $16,000.00 for the Father. Palmer recovered $10,000.00, making a total of $60,000.00. All four cases were consolidated for purposes of trial and were briefed together in the Supreme Court of Arkansas.

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ing company was, of course, not a party to the suit in the trial court, but in the judgment entered pursuant to the opinion of the Supreme Court of Arkansas, recovery against the surety company was decreed in favor of all of the respondents, and is liable to the respondents the same as Missouri Pacific Transportation Company. The Metropolitan Casualty Company is surety on the bond executed by Missouri Pacific Transportation Company payable to Eugene A. Parker, Administrator of the estate of Joe A. Parker, deceased, for the sum of $6,000.00, and was filed pursuant to the order staying the sending down of the mandate. The undertaking of this bond is that the Missouri Pacific Transportation Company will prosecute its appeal with diligence and if the same be denied by the United States Supreme Court, or if it fails to perfect its appeal within the period allowed by law, they shall pay all damages and costs which Parker may sustain by reason of the stay of mandate. Similar bonds were posted for the protection of the other respondents and in the amounts set forth in the Supreme Court's judgment.

On appeal, the Supreme Court of Arkansas affirmed the judgment in all cases with the condition that respondents Parker, Flagg and Carroll enter remittiturs of $11,000.00 each, otherwise the cause would be reversed and remanded for new trial. Palmer's judgment was affirmed without condition. (For opinion and judgment of the Arkansas Court, see Appendix, p. 14).

At the very outset, petitioners complained of certain actions of the trial court in refusing to quash the jury panel, on the ground that the court construed an act of the State of Arkansas against petitioners in such a way as to deny petitioners rights vouchsafed to them under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, and that the affirmance by the Supreme Court of Arkansas of the action of the trial court in this regard likewise caused the latter court to be guilty of a denial to the petitioners of a procedural due process in violation of the Fourteenth Amendment.

The circumstances underlying petitioners' claim of a denial of Federal right are as follows:

> "In June 1939, the court appointed three jury commissioners to select the regular panel of petit jurors to serve at the July term of the Nevada circuit court, and a jury was selected. After the July term of court was convened and the jury so selected was empaneled, a motion was made in another case then pending to quash the panel because one of the jury commissioners had served as such within four years prior to this service. The motion was

sustained and the panel was quashed, and at the same time the court appointed three other jury commissioners to select a jury to serve at an adjourned term of court to convene on August 7, 1939. A jury of 32 was selected and summoned, but the court, on investigation, decided that the statutes do not provide for the selection of a jury by jury commissioners after the term begins, but that, in case the jury panel is quashed, it is the duty of the court to order the sheriff to select a jury from the bystanders. The panel selected by the second set of commissioners contained nine of the jurors selected by the first set, which was quashed on motion. Acting on the order of the court, the sheriff selected a jury panel of 32 jurors who were the same as those quashed on the court's own motion." (Appendix, p. 14.) (140 S. W. (2d) 997-1,000.)

Petitioners moved to quash the jury panel, by reason of the above, and the same was overruled. (Abstract of Brief, Vol. 1, 12-14.) (Action of the court on the motion and objections thereto by counsel for petitioners; see Abstract of Brief, Vol. 1, 75-79.)

At the conclusion of the trial, petitioners filed motion for new trial, again complaining that the action of the court in declining to quash the jury panel deprived them of fundamental and established rights in violation of the due process and equal protection clauses of the Fourteenth Amendment. (See Specifications 4 and 5 of the motion for new trial. Abstract of Brief, Vol. 1, 15.)

Petitioners excepted to the overruling of the motion for new trial, preserving the claimed Federal right. (Abstract of Brief, Vol. 1, 78.)

After entry of judgment pursuant to the jury's verdict, a supersedeas bond was filed by petitioners. (Abstrast of Brief, Vol. 1, 28-29.) The first matter brought to the attention of the Supreme Court of Arkansas on appeal was the grievance of petitioners resulting from the refusal of the trial court to quash the jury panel, and that such action amounted to denial of procedural due process in violation of the Federal Constitution.

Petitioners claim that the trial court so construed Section 8333 of Pope's Digest as to cause the same to invade the rights of petitioners in violation of the Fourteenth Amendment. This claimed Federal right was definitely presented to the Supreme Court of Arkansas. Error was properly assigned and this was the first question discussed in petitioners' briefs in that court. Petition for rehearing was filed, and under Section IV, petitioners claimed Federal right was again asserted. (R. 238 .....). The petition for rehearing was denied. (R. 240).

Petitioners filed motion for stay of issuance of mandate in the court below, setting forth that by virtue of the various motions, and exceptions made both in the trial court and in the Supreme Court of Arkansas, the validity of Section 8333 and 8334 of Pope's Digest of the Statutes of Arkansas had been drawn in question, and had been so construed by both courts in such manner as to deny to petitioners their rights under the due process and equal protection clauses of the Fourteenth Amendment. It was made known to the court below that the stay of issuance of mandate was desired so that

time could be afforded petitioners to prepare an appeal to the Supreme Court of the United States. R. 240 .....). Chief Justice Griffin Smith signed an order granting the stay until and including the 19th day of September, 1940, on the condition that said appeal be perfected within the time prescribed by law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. By final judgment, the validity of Sections 8333 and 8334 of Pope's Digest of the Statutes of the State of Arkansas have been drawn into question in this cause on the ground of same being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution, the decision of the highest court of Arkansas being to the effect that the construction placed thereon when applied to petitioners in said cause was valid, the judgment of the Supreme Court of Arkansas being final.

2. The action of the trial court, in declining to sustain petitioners' motion to quash the jury panel, and the affirmance thereof by the Supreme Court of Arkansas amounted to a deprivation of fundamental and established rights of petitioners, which amounted to denial of Federal right, so far as procedural due process is concerned.

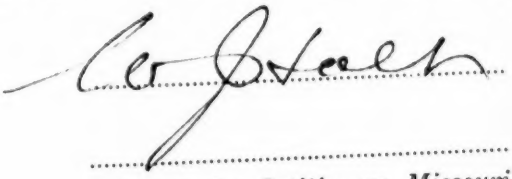
3. In respect of petitioners' claimed Constitutional rights, they have been consistent in such claims throug[illegible]

out, first in the trial court, by motion to quash and by motion for rehearing in that court, and finally by the assignments of error in the Supreme Court of Arkansas, and the petition for rehearing after the cause went against them in that court, and by that court's failure to give due recognition thereto, petitioners are entitled to invoke the judgment of this Court.

4. Petitioners having definitely raised a Federal question in the trial court and in the Supreme Court of Arkansas, they were entitled to a decision by that court, and not having received that consideration, petitioners are entitled to invoke the judgment of the Supreme Court of the United States, even though the existence of the right for which the Constitutional protection is claimed depends upon an act of the Legislature of the State of Arkansas.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Arkansas, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and proceedings in causes numbered and entitled on its docket; Nos. 4—5917, 4—5946, Missouri Pacific Transportation Company et al. vs. Parker et al.; and that the judgment of the Supreme Court of Arkansas be reversed, and that your petitioners may have such other and fur-

ther relief in the premises as this Honorable Court may deem proper.



Attorney for Petitioners, Missouri Pacific Transportation Company, Charles D. Johnson, Commercial Casualty Insurance Company, and Metropolitan Casualty Company.